

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of:

Herring Broadcasting, Inc Wealth TV

v

Time Warner Cable, Inc et al

MB Docket No. 08-214

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

PRE-HEARING CONFERENCE

In the Matter of: MB Docket No. 08-214

HERRING BROADCASTING, INC.,
d/b/a/ File No. CSR-7709-P
WEALTH TV,
Complainant,

v.

TIME WARNER CABLE, INC.,
Defendant,

HERRING BROADCASTING, INC.
d/b/a/ File No. CSR-7822-P
WEALTH TV,
Complainant,

v.

BRIGHT HOUSE NETWORKS, LLC,

Defendant,

HERRING BROADCASTING, INC.
d/b/a/ File No. CSR-7829-P
WEALTH TV,
Complainant,

v.

COX COMMUNICATIONS, INC.,
Defendant,

HERRING BROADCASTING, INC.
d/b/a/ File No. CSR-7907-P
WEALTH TV,
Complainant,

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v.

COMCAST CORPORATION,
Defendant,

NFL ENTERPRISES, LLC,
Complainant,

File No. CSR-7876-P

v.

COMCAST CABLE COMMUNICATIONS, LLC,
Defendant,

TCR SPORTS BROADCASTING HOLDING, LLP,
d/b/a/
MID-ATLANTIC SPORTS NETWORK,
Complainant,

File No. CSR-8001-P

v.

COMCAST CORPORATION,
Defendant.

VOLUME III

Thursday,
January 29, 2009
9:30 a.m.

Federal Communications Commission
TW A-363
445 Twelfth Street, S.W.
Washington, D.C.

BEFORE:

RICHARD L. SIPPEL, Administrative Law Judge

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ALSO PRESENT:

CHARLES HERRING, Wealth TV
ROBERT HERRING, SR., Wealth TV
CRISTINA CHOU PAUZÉ, Time Warner
Cable, Inc.

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P R O C E E D I N G S

(9:36 a.m.)

JUDGE SIPPEL: We have quite an assembly here this morning. Today's about the dates again.

I want to, excuse me, I want to - first I want to let you know that I am not going to be here - take these days down - I'm leaving for my daughter's wedding on the 4th of February, and this one is going to stick, because I'm going to do it myself.

And we are coming back on the 4th of March. I'm sorry, I'm leaving on the 4th of February and I'm coming back on the 10th of February, and then I'll be out again from the 4th of March to the 10th of March. There's intervening weekends there, so it's not as bad as it looks.

And so during that time Ms. Mary Gosse will be basically in charge of the office. I will always be available by - you know, I take my Blackberry with me, so you

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1 will be able - I'll be able to see what is
2 going on; rather put it that way. So that is
3 item number one.

4 The Commission order, FCC 09-4,
5 speaks pretty much for itself. But I'm a
6 little - I guess let me put it bluntly: I'm
7 interested in some clarification as to whether
8 or not the Commission wants a recommended
9 decision going to the Media Bureau, or whether
10 they want it going up to them directly.
11 Because they sure as heck want the case
12 expedited, looks like as quickly as humanly
13 possible. And if it's going to go through the
14 Media Bureau then it's going to be double.

15 Does anybody have any ideas on
16 that?

17 MR. HARDING: Paragraph two says
18 they want an order to the Commission as
19 expeditiously as possible, so I think that is
20 pretty clear. Send it directly to them.

21 MR. SOLOMON: And that is
22 consistent with the HDO that says to the

1 Commission .

2 JUDGE SIPPEL: Oh, it did? Okay,
3 all right, good enough then. All right.
4 Let's go through the obvious proposed dates,
5 and thank you for getting back so quickly on
6 this.

7 I didn't know about this case
8 coming back, I guess like everybody else.
9 Interestingly enough, I usually take the
10 business section on the Metro with me, but
11 yesterday I was wise enough to take the sports
12 section. And there it was on page three. So
13 anyway, that's - there you go.

14 Here's my point. The point on the
15 scheduling, I know we have to get into the
16 dates. I'm not too much concerned about that.
17 What I am concerned about is how are these
18 cases going to be tried. Obviously the
19 Commission anticipates, and I always expect,
20 a decision in each case, and that means that -
21 I'm not so much concerned again about the
22 decisions as I am the trial.

1 My thinking is this, I'm going to
2 go right to it. I think that the MASN and the
3 NFL Enterprise cases seem to be a little more
4 ready or prime to move with a greater degree
5 of rapidity, if I can say that, than the
6 Wealth TV cases for obvious reasons.

7 And so a footnote to that is that
8 NFL Enterprises has raised the question in its
9 proposed dates that their 616 claim might be
10 deferred, which according to NFL Enterprises,
11 that is the - that is where there is some
12 heavy lifting with respect to witnesses
13 outside of the experts, i.e. whether or not
14 there was an intent to force some kind of an
15 onerous condition on NFL Enterprises.

16 Now let me pose that, first of
17 all. I'm inclined to let the 616 go to I
18 don't know when, whenever. Sir?

19 MR. TOSCANO: Your Honor, I'm David
20 Toscano from Davis Pogue on behalf of Comcast
21 Cable which is the defendant in the NFL case.
22 I'd just like to say two things about that.

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1 First I think - I don't understand
2 the proposal to defer the claim. I think they
3 should either withdraw it with prejudice, or
4 we should try it. I don't know what it means
5 to simply defer it.

6 But more importantly I don't think
7 it's the case that that is the only claim that
8 involves heavy lifting with respect to factual
9 disputes outside of the experts, and there's
10 a couple of reasons for that, the first of
11 which is, their discrimination claim, the
12 NFL's discrimination claim, expressly
13 incorporates all of the factual allegations in
14 their complaint, and in particular paragraph
15 34 of the complaint picks up the allegations
16 about the supposed threat to tier the NFL
17 network as retaliation for Comcast not getting
18 certain game rights for its networks, as part
19 of the discrimination claims.

20 So there is no way that they can
21 simply excise those allegations from their
22 case by dropping their second claim.

1 But more importantly there are a
2 whole number of other areas in which there are
3 factual disputes outside of just that threat,
4 and I'd be happy to elaborate if you would
5 like me to.

6 JUDGE SIPPEL: Not right now, but
7 I wasn't saying that this wouldn't come up.
8 I'm just simply saying, I'm just taking what's
9 being presented to me on face value, and then
10 trying to get your insights into exactly what
11 you gave me.

12 Why is it - now there could be
13 discrimination without the 616 claim, couldn't
14 there?

15 MR. TOSCANO: I don't think the
16 discrimination claim is entirely dependent on
17 their financial interest claim; that's not
18 what I'm saying. But I'm saying they
19 certainly incorporate it in their pleadings,
20 so if their pleadings govern they can't just
21 excise it.

22 But I would also agree to the

1 extent they are trying to build the
2 discrimination claim outside of that, there
3 are additional factual issues that need to be
4 resolved outside of just expert discovery,
5 expert testimony.

6 JUDGE SIPPEL: Okay, hold that
7 thought. I might come back to you on that.

8 MS. WALLMAN: Your Honor, Kathy
9 Wallman for Wealth TV. Before we go too far,
10 I wanted to ask you to shed some light on why
11 you believe it's obvious that the Wealth TV
12 cases are less ready than the others. We are
13 prepared to go quickly. We would like to have
14 these cases tried first. We were the first to
15 file. Our complaints go back to December of
16 2007, the first of four. We're a small
17 business, least equipped of any of the
18 defendants to be able to withstand further
19 delay.

20 In many ways the claims that we
21 put before you are simpler. There's a refusal
22 to carry. There's discrimination or there is

1 not discrimination.

2 And so I respectfully contest your
3 characterization that it is obvious that we
4 are less ready, and we put before you now a
5 request that our cases go first.

6 JUDGE SIPPEL: Well, thank you.
7 That is exactly what I'm trying to get at.

8 All right, then that being said,
9 and again I'm going to ask for other input on
10 this, but that being said, taking it at face
11 value then, it seems to me that that would
12 slip you into the MASN mold which - I'm using
13 identification - again it seems to be that
14 they came up with the shortest procedural
15 case, and they seem to be ready to go on the
16 discrimination claim.

17 MR. COHEN: Actually in Wealth we
18 have actually submitted on behalf of the
19 defendant, a schedule to which Ms. Wallman
20 said she doesn't object. She may have some
21 other things to say about it. We submitted a
22 schedule that would get us to hearing slightly

1 before MASN. So I don't agree with what Ms.
2 Wallman said about the simplicity of what is
3 left to be done. We have a lot of work to do.
4 We haven't started. It was interrupted by our
5 detour to the Media Bureau. We were on the
6 verge of discovery. We haven't had any
7 discovery yet. But we have submitted a
8 schedule that gets us to a hearing on April
9 21, which I think is two weeks before MASN
10 suggests that they go. And we are prepared to
11 live with that schedule. We think it's
12 reasonable, and I think for the Wealth
13 defendants, it doesn't make much difference to
14 us. It's up to Your Honor if we go first or
15 second. If MASN wants to go after us, we are
16 prepared to go on our schedule, and Your Honor
17 will have to hear the parties out on the NFL
18 Enterprises. But we think we submitted a
19 reasonable schedule. We have basic agreement
20 on it, and we are prepared to go to trial on
21 it.

22 JUDGE SIPPEL: So you would be -

1 you would go along with the idea of having a -
2 - say putting Ms. Wallman's case up first?
3 That wouldn't make a difference to you?

4 MR. COHEN: What we are saying
5 is, we would go on our schedule, if Your Honor
6 decides that MASN will go after us, and
7 wherever it puts NFL Enterprises, that doesn't
8 make a difference to us.

9 The schedule makes a difference to
10 us. We think we have given - what we have
11 attempted to do is to say we were at a certain
12 place at the time of the meeting of your oral
13 order. What we have done is simply added that
14 delay caused by that process.

15 But yes, it makes no difference to
16 us if we go first or second or third as long
17 as the schedule is otherwise sensible and
18 gives us time for what we need to do.

19 JUDGE SIPPEL: Right. Well, I
20 hope it goes without saying that it is not
21 going to be very practical to try and just sit
22 in a courtroom with everybody and go through

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1 these six cases. I mean you can certainly
2 have people monitoring the case. I'm not
3 saying that you would be shut out. But I want
4 to focus on individual cases at individual
5 times, and it seems to me that what I'm
6 looking to do is to find the shortest, find
7 those that are ready to go first, and those
8 that are going to be the shortest as far as
9 discovery and all that goes along with that.

10 MR. COHEN: It's not obvious to
11 me, Your Honor, that Wealth will be the
12 shortest, because while the defendants are
13 prepared to consolidate lots of proceeding for
14 the purposes of these four cases, there are
15 individual parts of these cases.

16 So I think what we imagine is that
17 we will try these four cases in tandem, and at
18 whatever time savings we can accomplish
19 through doing things together, but there will
20 be individual pieces of each other's cases.

21 JUDGE SIPPEL: Okay, that's fine.
22 Let's move the ball.

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1 So there's four Wealth TV cases,
2 and those are the ones you are referring to as
3 being tried in tandem.

4 MR. COHEN: Yes, sir.

5 JUDGE SIPPEL: In some way,
6 shape, or form.

7 MR. COHEN: Yes.

8 JUDGE SIPPEL: Which then cuts
9 out MASN and NFL Enterprises.

10 MR. COHEN: We don't see any
11 reason for those proceedings to be combined,
12 subject to Comcast.

13 JUDGE SIPPEL: So then the
14 logical thing to do would be to - both of
15 them, MASN seems to have a particular interest
16 in, would seem to anyway have a particular
17 interest in going first in light of what they
18 have been representing; i.e. spring, opening
19 date.

20 MR. COHEN: And we don't object
21 to that.

22 MR. MILLS: Your Honor, David

1 Mills for Cox. I agree that they should be
2 separate in time. The MASN case with four
3 defendants is likely to be longer than the
4 MASN case; we don't object to MASN going
5 first. But there may be reasons to have
6 separate hearings anyway when we come up with
7 a protective order. It may not be appropriate
8 to have defendants in different cases sitting
9 in, or for plaintiffs in different cases
10 sitting in on the other cases. So there is
11 another reason to have them separate in time,
12 so we agree to that.

13 JUDGE SIPPEL: If you want to - I
14 mean that could be handled just the exclusion
15 of the people at certain points when it comes
16 up. All right, I hadn't parsed it down that
17 far.

18 But as a general rule, as a
19 general proposition, my desire is, my interest
20 is, and I think it's everybody else's
21 interests, is to keep the activity in the
22 courtroom focused on litigation, to be as

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1 focused as possible, and that means the fewer
2 people who will be actors the better. But I
3 am certainly not trying to exclude somebody,
4 unless the situation is like you say, then we
5 could exclude.

6 MR. MILLS: We don't have an
7 objection if MASN wants to go first, if it's
8 shorter and they had some reason to go first.
9 We don't have a view one way or the other on
10 that.

11 MS. WALLMAN: Your Honor, Wealth
12 TV would have a view if the Court adopts the
13 schedule that MASN has proposed, which
14 actually suggests a start date later than
15 what's on the schedule that I have not
16 objected to with respect to defendants.

17 The ordering of the cases does
18 relate to the schedule that the court adopts,
19 so -

20 JUDGE SIPPEL: I understand that.

21 MS. WALLMAN: So they are
22 related. We want to go on the schedule that

1 *doesn't have us starting in the middle of May.*

2 JUDGE SIPPEL: I understand that.

3 Sir?

4 MR. BECKNER: Bruce Beckner for
5 Bright House Networks in the Wealth case. I
6 mean I think just to kind of boil this down,
7 what we are saying, Wealth TV's defendants, is
8 that we kind of conceive of that as one case
9 with four defendants, which ought to be tried
10 as one case with four defendants. And we are
11 prepared to do that beginning April 21.

12 Whatever happens with the MASN
13 case, whatever happens with the NFL case, is,
14 speaking for my client, completely separate
15 and essentially an unrelated matter.

16 So I mean if that is of any
17 assistance to you, I think that is the view of
18 the defendants in the Wealth case, and perhaps
19 even Ms. Wallman, is that we are ready to go
20 on April 21 to try all those cases, and you
21 know we have a schedule that gets us there.

22 Whether or not the MASN case and

1 the NFL case comes earlier or later doesn't
2 really, I don't think, affect us in terms of
3 our case.

4 MR. MILLS: The only thing I
5 would add is that if we do - if Your Honor
6 does decide to put the MASN case first, okay,
7 we would like to have a specific date for the
8 beginning of the Wealth cases, just because we
9 want to plan witnesses and attendance and that
10 sort of thing.

11 JUDGE SIPPEL: I understand. I'm
12 going to narrow this down as we go. I'm
13 trying to get a principle established, and it
14 seems like it is. We've got the four Wealth
15 TV cases. There is a way of doing those in
16 tandem, and there is a good reason to do that
17 in some ways. There are two other cases, and
18 I have to issue an individual decision on each
19 case.

20 Now all I'm trying to do is just -
21 well, you know what I'm trying to do, and I
22 don't think anybody is really opposed to it.

1 The dates having to do with discovery and all
2 that type of thing, I mean they are going to
3 have to apply to a great degree across the
4 board. I don't know what I can do. I am
5 limited so much in time. I can't say, well,
6 you'll have six months and you'll have two
7 months, because it's not going to work.

8 Sir?

9 MR. LEVY: Your Honor, Gregg Levy
10 for the NFL Network. Just so our position is
11 clear, we don't want to get into a race or
12 contest with the co-complainants, if you will,
13 over who is on first. But I do want to note
14 that we suggested in our pleading yesterday
15 that we were prepared to go first. We
16 continue to be eager to go first.

17 The MASN schedule, which as I
18 understand it is agreed, calls for a hearing
19 to begin on May 5th, which means that if that
20 is the first hearing then we are looking at
21 schedules for the others in late May or June.

22 JUDGE SIPPEL: Well, please don't

1 misunderstand me. If it looks like MASN
2 should go first, and I haven't gotten there
3 yet, they are going to have to change the
4 dates. The party going first has to be the
5 party that has got the best dates, and they
6 don't have the best dates right now. Now they
7 can bid them up, or you and MASN can negotiate
8 this in some way.

9 The point - at least we've got to
10 the point where nobody objects to the problem
11 of having MASN and NFL done separately from
12 Wealth TV.

13 MR. LEVY: We agree with that,
14 Your Honor.

15 JUDGE SIPPEL: So it's a question
16 of whether you or MASN wants to go first - I
17 haven't lost sight, Ms. Wallman, of what you
18 are saying with respect to your Wealth TV
19 case. But I am getting opposition from the
20 other side, and the big scare is always
21 discovery and this type of thing.

22 MS. WALLMAN: Your Honor, I don't